WORK SESSION
OF THE BRIGHAM CITY COUNCIL
TO DISCUSS RESIDENTIAL TREATMENT CENTERS
NOVEMBER 3, 2005
6:00 P.M.

PRESENT:	Lou Ann Christensen	Mayor
	Jon Adams	Councilmember
	Holly Bell	Councilmember
	Alden Farr	Councilmember
	Reese Jensen	Councilmember
ALSO PRESENT:	Jody Burnett	ULCT Attorney
	Jared Johnson	Building Inspector
	Jeff Leishman	Community Development
	Bruce Leonard	Director of Public Works
	Reese Nielsen	Planning Commission Member
	Tom Petersen	Building Inspector
	Barbara Poelman	Planning Commission Member
	Dennis Sheffield	Director of Finance/Deputy City Recorder
	Barbara Stokes	Planning Commission Chair
	Mark Teuscher	City Planner
	Don Tingey	City Administrator
EXCUSED:	Bob Marabella	Councilmember

Mayor Christensen called the meeting to order and excused Councilmember Marabella.

Mr. Teuscher explained that the City's current zoning ordinance defines residential facilities for the disabled and residential treatment facilities differently, and they are allowed in different areas. Residential facilities for the disabled are allowed in any residential area. Residential treatment facilities are allowed only in manufacturing zones. There have been substantial changes in how municipalities deal with these facilities over the last several years.

Mr. Burnett stated that in the 1980s two trends merged together that set the stage for these kinds of disputes. In the mental health care treatment industry, a strong trend was initiated to mainstream the disabled into the least restrictive environment possible. This was supported to the extent that Utah State Hospital was under threat of losing federal funding for not moving quickly enough to move everybody out of that formal hospital setting that could, with assistance, live in the community at large. At about this same time, the Federal Fair Housing Act was amended to include people with disabilities as a protected class, along with race, age and gender. This applies to municipalities if, as a result of land use regulations and decisions, these decisions render the housing of choice less readily available on the basis of the protected status. In response to this federal legislation, the State of Utah also adopted its own Fair Housing Act and, more importantly, the State Land Use and Management Act (LUDMA) was amended to mandate that residential facilities for people with disabilities shall be a permitted use in any zone in which residential dwellings are allowed.

Mr. Burnett explained that the first generation of lawsuits involved traditional group homes. His first case was for Orem City over 15 years ago. It involved four adult males living in a home under contract with the State Division of Services for People With Disabilities. One of these adults had been in a state hospital for 20 years after being declared incompetent to stand trial for a murder charge. The contract said four adult males "with the history of sexual deviant behavior." This was in one of Orem's nicest neighborhoods. The public hearing was packed and people were very concerned. Orem City approved the permit with the conditions that were in the State Code verbatim, and they lost because at that time, the State Code included two things. One was 24-hour supervision, and the other was neighborhood advisory committees. The issue was if there were four BYU students renting a home, would they be subject to these two regulations? No, they would not. If they are not, then these regulations make the housing of choice less readily available based on their protective status. Municipalities have to learn to think in terms of reasonable, content neutral, land use based concerns, such as traffic, etc.

After this case, the state statute was amended. It now states that "each municipality shall adopt an ordinance for residential facilities for persons with a disability and the ordinance shall comply with the Federal Fair Housing Act . . . . To the extent required by federal law, provide that a residential facility for persons with a disability is a permitted use in any zone where similar residential dwellings that are not residential facilities for persons with a disability are allowed." Mr. Burnett said this is a great caveat, except he did not know anyway to *not* comply with federal law and not have a permitted use in any of these zones. The statute continues that subject to compliance with federal law, an ordinance can "require residential facilities for persons with a disability 1) to be reasonably dispersed throughout the municipality; 2) to be limited by number of occupants; 3) for residential facilities for persons with a disability that are substance abuse facilities and are located within 500 feet of a school . . . 4) provide that a residential facility for persons with a disability that would likely create a fundamental change in the character of a residential neighborhood may be excluded from a zone." Mr. Burnett added he has never known anyone who lives next door to one of these things in any jurisdiction that doesn't subjectively perceive this to be the case.

Mr. Burnett explained that there are three grounds that have to be evaluated in a Federal Fair Housing case. The first is whether there is intentionally discriminatory conduct. This is very rare in the State of Utah. The second one is that even though the regulations are reasonable on their face, by application they tend to have a disparate impact on the protected class. Even if a municipality gets over these two hurdles, the municipality has an affirmative obligation to make a reasonable accommodation in their land use regulations for these kinds of facilities if it won't fundamentally alter what is trying to be accomplished with the regulation. Mr. Burnett stated that in recent years he has spent most of his time dealing with number three.

Mr. Burnett explained another case, Haven vs. West Valley City. The Episcopal Church has a very nice church next door to Truman Elementary School. As part of their community outreach program, they lease property to a group that operates a drug and alcohol rehab facility named The Haven. They proposed to build a 17-bed stand alone 60-90 day treatment facility next door to the elementary school. West Valley City argued that this was more like a short-term, short-stay medical treatment facility, or even a lodging facility, and if Widow Jones could not open a bed and breakfast in an R-1-8 zone, they shouldn't be able to open this facility. However, West Valley City lost because the court said there is no intentionally discriminatory component of that on its face, and it doesn't have a disparate impact, but they said West Valley City did not affirmatively go out and have a dialogue with them about making a reasonable accommodation. The courts also said that the street was a very busy collector street, the building is going to look like the other buildings on the church campus, and West Valley City could not make an adequate showing that it would fundamentally alter the characteristic of their zoning scheme.

Mr. Burnett said no one is winning these cases in court. One of the key problems is that the definition of what constitutes a disability is different for this purpose than it is for the purpose of making people eligible for treatment. To be eligible for treatment for services, they have to have three or more conditions that impact their daily life. For purposes of this definition, it is one. Therefore, if the City receives a letter from an operator stating they are going to treat "drug and alcohol addiction, behavior disorders, various types of disabilities such as attention deficit disorder, bipolar disorder, depression, attachment disorder, post dramatic stress disorder, low functioning disabilities," any one of these by itself is sufficient to qualify. In addition, if there are two people in a home that qualify in any one of these, it is a residential facility for persons with disabilities.

Mr. Burnett said one of the problems municipalities have is that the state does not differentiate between different types of residential facilities. If they are a residential treatment facility, it does not specify whether they are a facility for treatment of people with disabilities.

Mr. Burnett suggested the only possible way around this is if somebody is operating a lock down facility that is receiving youth who are adjudicated under the juvenile corrections system as a court ordered treatment. If "reasonable content mutual regulations" is imposed, such as parking requirements imposed on everyone else, they have to be even handedly applied to any other remotely similar land use. Mr. Burnett cautioned against making a decision to address one minor issue that has an adverse effect on the rest of the City's policies, goals and objectives. For example, in Murray City, an area was annexed into their City and a facility that had previously operated as a bed and breakfast and a reception center was purchased for the operation of a youth treatment facility. Neighbors, of course, were opposed. However, given the size of the facility, it was not realistic to think that anyone was going to purchase it for single residential use. In terms of an

objective land use impact such as parking, traffic, etc., the treatment facility has girls 12-17 with no cars and staff, compared to a reception on weekend nights and traffic coming and going to the B&B. There is no realistic way Murray City could determine that this kind of facility is not going to be allowed.

Mr. Burnett said the reason it has been mandated that these facilities be allowed in a residential zone is because it has been proven that the clinical effectiveness of these programs is very much correlated in being in a residential area. The whole point is to rehab people and have them function in a community.

Mr. Burnett continued that although he is sympathetic to the natural reaction of the neighbors of these facilities, 99% of the time it has been unfounded. These are not the ones that parents need to worry about selling drugs to their kids. They have checked themselves into a treatment program and are supervised 24 hours a day.

Even those jurisdictions who have conscientiously followed changes in the law, updated their ordinance in full compliance with current law, have done everything they can to carefully define and differentiate between those kinds of facilities, find themselves in a position where they need to prove historical circumstances, and why it would alter the effectiveness of the zoning scheme. This is very, very difficult to prove.

Mr. Larsen said Triumph told him that they are a facility for disabled persons, but they will also be taking those that are not disabled. They will be there because they have been adjudicated or because they have been placed there, but they are not disabled. Mr. Burnett said it is really difficult to differentiate these subcategories, and the state has not been very helpful. He recommended that before a decision is made, the City should get a better understanding from the state of what they are and are not licensed for, not only from the Division of Services for People with Disabilities, but also what the placement issue is from Juvenile Corrections. The City needs to understand why they are there.

Mr. Teuscher explained that Triumph wants to move to the old Peach Tree Assisted Living Center. It is going to be very difficult from a land use perspective to tell them they cannot move there. The building is designed to house a large number of people. They have individual rooms, a nurse's station and offices.

Mr. Teuscher said another issue is that finding out who these people are falls under HIPPA. The City cannot have access to their medical records. The City cannot see what an individual has done. They can talk to the City in generalities of the entire group, but not individually. The City can only determine if the facility has enough rooms, enough bathrooms, enough physical facilities to handle the facility.

Mayor Christensen asked if the City would be able to track if they were court ordered to be in a facility. Mr. Burnett said he did not know for sure. The City might be able to do a separate licensing review. The problem is that even though the amendment was in 1988, as cases come up through the system, it takes a long time to sort it out. Right now, cases are varied on these issues with a lot of gray areas.

Mr. Burnett said his experience with the Orem City case was that the neighbors did not feel like Orem did them any favors by holding a public hearing that led them to believe, right or wrong, that if they showed up and made a presentation Orem would have some bases to deny the application. Some jurisdictions do not want the Council to give the authority. He tells jurisdictions to think strongly about making this a staff level review. While it is difficult not to have some kind of forum to educate neighbors and let them air their issues, if they come to a public hearing they get the feeling that it was a sham and a waste of time because the City cannot do anything with their input. Mr. Burnett added that West Valley City felt that they should have some kind of public forum to at least inform people what was going on. So they held a public information meeting. However, this came back to bite them. What other land use application is there some kind of information meeting? He felt that, ultimately, a public hearing sets everybody up for failure because there is virtually nothing that can be presented as evidence in these proceedings.

Mr. Johnson asked if there is a safety issue. Mr. Burnett replied that this brings up a broader issue. He explained that the City should not be making anything conditional use unless it is based on the presumption that in most circumstances the City will be able to articulate the reasonable set of conditions to mitigate the potential detrimental effects. If this cannot be done, it is the City's burden to explain why there are not a reasonable set of conditions. The state statute now states that "conditional use shall be approved if

reasonable conditions are proposed or can be imposed to mitigate a reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards. If the reasonably anticipated detrimental effects of the proposed conditional use cannot be substantially mitigated by the proposal or the imposition of reasonable conditions to achieve compliance with applicable standards, the conditional use permit may be denied." Mr. Burnett said this is not to say that safety is an important consideration in a lot of circumstances; however, a few neighbors complaining that they are worried about the kids next door, does not constitute a safety issue.

Mr. Burnett recommended the City review the ordinances regarding conditional uses. The City cannot use the conditional use process in any context to delay the difficult legislative determination about whether the issue be allowed. The problem with conditional use cases is that 95% of them do not have anything to do with any site specific determinations about whether conditions can or cannot be imposed.

Mayor Christensen expressed appreciation to Mr. Burnett for attending. The meeting adjourned at 6:55 p.m.